MARASHLIAN & DONAHUE, PLLC
THE COMMLAW GROUP

April 27, 2018

Ex Parte

Ms. Kris Monteith
Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Request for Clarification of FCC Form 499 Reporting of Revenue Derived from Private Carrier Services, Docket No. 06-122

Dear Ms. Monteith:

My name is Jonathan Marashlian, and I am the Managing Partner at Marashlian & Donahue, PLLC. I am also the founder and CEO of The *Comm*pliance Group ("TCG"), a consulting firm offering service providers outsourced regulatory compliance services in order to simplify and streamline certain compliance burdens imposed on regulated carriers. TCG frequently draws on the niche expertise of the attorneys at its affiliated boutique communications law firm to achieve maximum compliance with Federal Communications Commission ("FCC" or "Commission") rules and regulations, as reflected in the FCC Form 499 instructions and otherwise. TCG currently provides a variety of FCC compliance services, including FCC Form 499 preparation and filing, to nearly 250 clients operating in nearly every segment of the communications industry. As such, TCG's interactions with the Universal Service Fund administrator, USAC, are frequent and cover a range of issues, both administrative and substantive. Both of our firms are intimately familiar with the intricacies of the FCC Forms 499-Q, 499-A, and their respective instructions, and have advocated before USAC and the Commission on numerous occasions whenever these "administrative forms" and/or USAC yield outcomes that are inconsistent with the Communications Act, FCC rules & regulations, and judicial precedent.

On behalf of TCG and the service providers it serves, I write to you today seeking guidance on a long-outstanding question that has led to an unacceptable degree of confusion for several clients of both firms, and has unequivocally and demonstrably resulted in the imposition of regulatory burdens and expenses in the form of Title II regulatory fees (as further defined below) on non-Title II service offerings.

Confusion arises because neither the Form 499-Q nor Form 499-A ("Form 499s") affords carriers that offer some services on a private carriage basis and other services on a common carriage basis the ability to separately report private and common carriage revenues, such that private carriage revenues can escape the imposition of Title II Fees, which are comprised of TRS Fund contributions and LNP and NANP program support fees (hereafter, "Title II Fees"). On revenue derived during the 2017 year, these Title II Fees amounted to roughly 2.2% of affected interstate and international telecommunications revenue.

Now, to be clear, countless telecommunications carriers offer some services on a private carriage basis and other services on a common carriage basis, all within the same corporate entity (i.e., not through structurally separate affiliates). Clients of our law firm and TCG operate services in this manner.

In last year's Business Data Services ("BDS") Order, the Commission endorsed long-standing private carriage legal precedent.[1] As the BDS Order reiterated, to the extent that a carrier makes individualized decisions, in particular cases, whether and on what terms to deal, the carrier operates as a private carrier. More specifically, the Commission held in the BDS Order that "sufficient evidence of individualized determinations whether to offer service to given customers and, when services are offered, individualization on a sufficient range of key terms of the offering…warrant a finding of private carriage."[2]

Importantly, as the BDS Order confirmed, a carrier can offer some services as a private carrier and other services as a common carrier. Indeed, the BDS Order unequivocally endorsed prior precedent that held that a carrier "can be a common carrier with regard to some activities but not others,"[3] and that "providers of telecommunications services … are acting as common carriers to the extent that they are providing such services."[4]

One of the reasons that this analysis is important is that revenue derived from the offering of private carrier services is not subject to Title II Fees, whereas common carriage revenues are subject to these fees. However, the FCC-sanctioned Telecommunications Reporting Worksheets (Form 499s) used to report revenue to USAC for the purpose of determining a carrier's contribution obligations simply do not afford filers with both private carriage and common carriage revenues the opportunity to separately report the revenues so that TRS, LNP, and NANP fees are only billed based on common carriage revenues.

On this topic, USAC has taken an "all or nothing" approach. If a carrier lists "Private Service Provider" as its #1 telecommunications activity in Line 105 of Form 499-A, all revenues reported on the Form will be exempted from Title II Fees. However, if the carrier lists "Private Service Provider" as anything other than #1 on the Form, all retail telecom revenues reported on the form will be shared with the TRS, LNP, and NANP fund administrators and subject to Title II Fees. The form does not provide a means for the filer to segregate or otherwise exclude only those revenues derived from private carriage from Title II contribution. This "all or nothing" approach is subject to abuse; deprives the Title II Funds of funding; and causes some filers to over- or under-pay Title II Fees.

We were disappointed when the 2018 Form 499-A and instructions were released by the Bureau, as it was done without any notice or opportunity for the industry to comment on the contents of the Form and instructions. Our disappointment was exacerbated upon learning the Bureau had not addressed concerns regarding the inability to segregate private carrier and

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[1] In the Matter of Business Data Services in an Internet Protocol et. al., Report and Order, FCC 17-43 at ¶ 267 *et. seq.* (Apr. 28, 2017) ("BDS Order").

[2] *Id.* at ¶ 276.

[3] *Id.* at ¶ 269 n. 663.

[4] *Id.* at ¶ 269.

common carrier revenue. The Commission's approach to circulating the 2018 Form 499-A without discussion deprived the industry of an opportunity to provide valuable input based on experience filling out the Form; and it further perpetuated obvious deficiencies, of which the Bureau is well aware.

One of our firm's clients has attempted, through various filings, to solicit FCC input and a decision on this very important and vexing issue – one that potentially costs carriers (and customers of their private carriage services) untold amounts of money each and every year, dating back well over a decade. There is a long-pending Petition for Declaratory Ruling on this topic, as well as a Request for Review of a USAC decision rejecting the use of Line 603 of Form 499-A as a means of certifying specific revenues as private carriage revenues entitled to exemption from Title II Fees.

But this outstanding issue is no longer just about just one carrier; indeed, it never has been. Our law firm finds itself stymied in its efforts to advise many other clients on the "correct" approach to completing a Form 499 given the utter lack of clarity around the proper method of segregating private carrier and common carrier revenue, so as to avoid the erroneous imposition of Title II Fees on the former revenue category. Some firm clients have had to bend over backwards to avoid Title II Fees on their private carriage revenue, including undergoing the costly process of structural separation. Under the applicable statutory and judicial precedent (and as unequivocally reflected in the BDS Order), no telecommunications carrier should be required to structurally separate to avoid the imposition of Title II obligations and Title II Fees.

The Form 499s and their respective instructions should provide the industry with clear, unambiguous, and easy to effectuate means by which to segregate revenue from these statutorily distinct categories of service. The Commission must step in and resolve the current state of affairs immediately. Any further delay risks perpetuation of the untenable and, arguably, unlawful policies, practices and procedures administered by USAC.

Last month, we requested that Mr. Fred Theobald, Director of Financial Operations at USAC, provide a written description of USAC's practices and procedures with regard to this matter. (See **Attachment 1**). Mr. Theobald indicated that it would only be proper to request this information from the FCC, not from USAC.

Thus, in the interests of ensuring proper reporting of revenues to USAC, I ask that you provide clarity on the following question:

> **For a company with both common carriage and private carriage revenues, what is the correct way to report revenues that avoids improperly triggering private carriage contributions to TRS, LNP, and NANP?**

Thank you for your time and attention to this request.

Sincerely,

Jonathan S. Marashlian
Managing Partner

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Attachment 1

Jonathan Marashlian

From: Jonathan Marashlian
Sent: Wednesday, March 28, 2018 4:04 PM
To: Fred Theobald
Cc: Jackie Neff; Kimberly Morning
Subject: Re: Reporting of Private Carriage Revenues on Form 499-A

Fred-

I appreciate your response and apologize if you read an unintended undertone in my request for guidance.

I would, however, request that you provide an explanation as to how USAC's current procedures comply with FCC rules (judicial precedent and statute) when it comes to the matter of segregating private carrier revenue from common carrier revenue such that private carriage revenue is not delivered to the administrators of the Title II programs. The response "we believe our practices and procedures comply with FCC rules and orders" does not answer the specific question, which solicited an explanation of what those procedures are.

If USAC believes its practices and procedures comply with FCC rules and orders, then it should be within the realm of reasonableness for us to expect USAC to elucidate what those practices and procedures are. The practices and procedures reflecting the FCC's rules and orders should not be a mystery to impacted providers as this violates fundamental principles of due process and fairness.

On behalf of our impacted clients, I would respectfully request a written explanation of the current USAC practices and procedures and, if they exist, a tie back to the Form and Instructions.

Thank you,
Jonathan

Sent from my iPhone

On Mar 28, 2018, at 12:55 PM, Fred Theobald <Fred.Theobald@usac.org> wrote:

> Hello Jonathan,
> USAC administers the FCC's rules for the Universal Service Fund uniformly for all contributors regardless of name or prior history. Regarding your numerous questions and requests for legal analysis, many of these questions have been raised in appeals pending before the FCC and we believe our practices and procedures comply with FCC rules and orders. If you have any further questions or concerns with USAC's administration of those rules, we recommend contacting the FCC.
> Best
> Fred
>
> **From:** Jonathan Marashlian [mailto:jsm@commlawgroup.com]
> **Sent:** Friday, March 23, 2018 9:51 AM
> **To:** Fred Theobald <Fred.Theobald@usac.org>; Jackie Neff <jrn@commlawgroup.com>
> **Subject:** RE: Reporting of Private Carriage Revenues on Form 499-A
>
> Thank you, Fred.
>
> Does the same answer apply to service providers not named Locus Telecommunications, Inc.?

Our firm represents service providers that sell Business Data Services on both a Common and Private Carrier basis. As the Commission clarified quite stridently in its 2017 Business Data Services Order, starting at paragraph 257 through 285 (https://ecfsapi.fcc.gov/file/0428162212992/FCC-17-43A1.pdf), a service provider can function as BOTH a private carrier and common carrier – even for the very same service offering. The BDS Order reinforces long-standing judicial precedent establishing that a provider can be a common carrier for some activities, but not others. See Sw. Bell Tel. Co. v. FCC, 19 F.3d 1475, 1481 (D.C. Cir. 1994) ("As we said in NARUC II, 'it is at least logical to conclude that one can be a common carrier with regard to some activities but not others.') (quoting NARUC II, 533 F.2d at 608); see also 47 U.S.C. § 153(51) ("[a] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services").

Please point us to the Form 499 Instructions or the Form itself and identify for us how a service provider with a single Filer ID is able to segregate its revenue from private carrier activities from its common carrier activities? Please identify how the Form 499 Instructions and Form are consistent with the BDS Order, NARUC II and its progeny? Please explain how a service provider avoids Title II fees on its revenue from private carrier activities?

Let's leave Locus out of the equation so that USAC can provide us with necessary guidance that is impacting a far larger swath of clients.

Regards,
Jonathan

From: Fred Theobald [mailto:Fred.Theobald@usac.org]
Sent: Friday, March 23, 2018 9:37 AM
To: Jackie Neff <jrn@commlawgroup.com>
Cc: Jonathan Marashlian <jsm@commlawgroup.com>
Subject: RE: Reporting of Private Carriage Revenues on Form 499-A

Hello Jackie,
Thank you for your inquiry below regarding whether Locus Telecommunications may use Line 603 of the FCC Form 499-A to identify any private carriage revenues it believes are not subject to Telecommunications Relay Service (TRS), Local Number Portability (LNP), and/or North American Numbering Plan Administration (NANPA). Locus should refer to the 2018 Telecommunications Reporting Worksheet Instructions to confirm it complies with all reporting requirements, including reporting all revenues on the required lines. Page 45 of the Instructions provides further details about Line 603 of the FCC Form 499-A. Please also note that Locus may not engage in self-help remedies to address what the it perceives to be FCC Form 499 deficiencies. *See* OCMC, Inc., EB-04-IH-0454, Notice of Apparent Liability for Forfeiture, 20 FCC Rcd 14160, 14164, para. 13 (2005) (stating that a carrier "may not engage in self-help").
Best
Fred

From: Jackie Hankins [mailto:jrh@commlawgroup.com]
Sent: Wednesday, February 21, 2018 1:57 PM
To: Fred Theobald <Fred.Theobald@usac.org>
Cc: Jonathan Marashlian <jsm@commlawgroup.com>
Subject: RE: Reporting of Private Carriage Revenues on Form 499-A

Fred-

Just following up on my message below.

Thank you in advance for your assistance!

Jackie

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From: Jackie Hankins
Sent: Friday, February 16, 2018 1:40 PM
To: 'ftheobald@usac.org' <ftheobald@usac.org>
Cc: Jonathan Marashlian <jsm@commlawgroup.com>
Subject: Reporting of Private Carriage Revenues on Form 499-A

Fred-

Our firm just reviewed the new 2018 Form 499-A instructions. While we have raised (both with USAC and the FCC) concerns about deficiencies in the Form relative to the reporting of private carriage revenue, the new form does not appear to have addressed these concerns.

Specifically, the form does not provide an explicit means for service providers that offer some services on a private carriage basis and others on a common carriage basis, to segregate private and common carriage revenues. As you know, private carriage revenues are not subject to TRS, LNP or NANP ("Title II") fees, and so legally, filers must be permitted to exclude these revenues from their Title II fee contribution bases. As we understand it, USAC has taken an "all or nothing" approach – where, if a carrier lists "Private Service Provider" as its #1 telecommunications activity in Line 105, all revenues reported on the Form will be exempted from Title II fees. However, if the carrier lists "Private Service Provider" as anything other than #1 on the Form, ALL retail telecom revenues reported on the form will be shared with the other fund administrators and subject to Title II fees. The form does not provide a means for the filer to segregate or otherwise exclude only those revenues derived from private carriage from Title II contribution.

USAC has rejected the use of Line 603 as a means to identify and certify specific revenues as private carriage revenues entitled to exemption from the Title II funds. However, the FCC has consistently recognized (even as recently as 2017 in its BDS Order – see paras. 268-285: https://apps.fcc.gov/edocs_public/attachmatch/FCC-17-43A1_Rcd.pdf)that each service must be evaluated independently to determine whether it qualifies as a private or common carriage offering.

The attached Ex Parte letter filed with the FCC, on behalf of Locus Telecommunications, describes the issue in more detail (including links to relevant filings).

Can you advise whether USAC will now allow the use of Line 603 and/or an explanatory attachment to enable filers to segregate common and private carriage revenues on their Form 499-A filings (allowing, consistent with FCC rules, filers to contribute to the Title II funds exclusively on common carriage revenues)?

Thanks in advance for your consideration and assistance with this matter.

Jackie

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